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ETHICS 101: THE GOOD THE BAD & THE UGLY

Presented By:

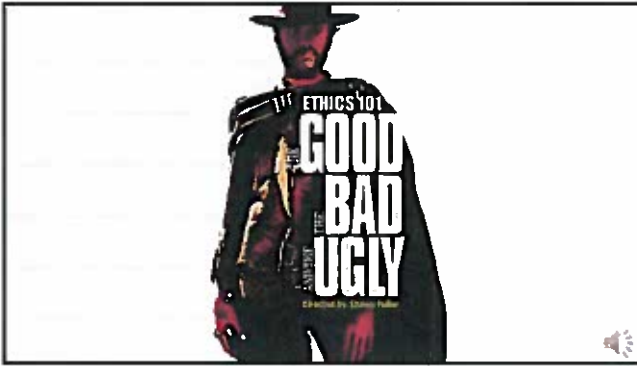
SHAWN FULLER

Assistant Attorney General
Arizona Attorney General's Office

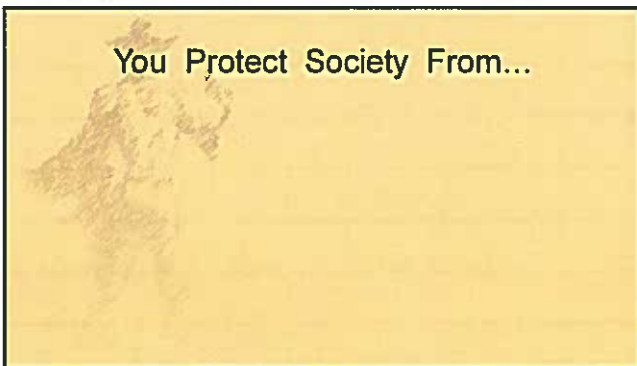
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ELIZABETH ORTIZ
EXECUTIVE DIRECTOR







We Protect Kids From...

ETHICS 101

THE GOOD...

Each lawyer, unless exempted, must acquire a total of 15 hours of CLE, of which 3 of those hours must be in professional responsibility.

THE BAD...

THE UGLY...



THE RULES

They may be stupid, arbitrary and irritating. But god help you if you break them.

"PURPOSE OF LAWYER
DISCIPLINE IS NOT TO PUNISH
THE OFFENDER, BUT TO
PROTECT THE PUBLIC, THE
PROFESSION, AND THE
ADMINISTRATION OF JUSTICE."

OUTLINE

- RULE 1.1 COMPETENCE
- RULE 1.2 SCOPE OF REPRESENTATION
- RULE 1.3 DILIGENCE
- RULE 1.4 COMMUNICATION
- RULE 1.11 SPECIAL CONFLICTS OF INTERESTS
- RULE 3.1 MERITORIOUS CLAIMS &
 CONTENTIONS
- RULE 3.2 EXPEDITING LITIGATION

OUTLINE

- RULE 3.3 CANDOR TOWARDS THE TRIBUNAL
- RULE 3.4 FAIRNESS TO OPPOSING PARTY &
 COUNSEL
- RULE 3.6 TRIAL PUBLICITY
- RULE 3.8 SPECIAL PROSECUTORIAL
 RESPONSIBILITIES
- RULE 3.10 EXCULPATORY INFO POST – CONV.
- IMMUNITY QUALIFIED v. ABSOLUTE

ER 1.1 COMPETENCE

ER 1.1 COMPETENCE

- 1) _____
- 2) _____
- 3) _____
- 4) _____

THE GOOD...

*MOST EVERYONE IN
HERE IS COMPETENT...

THE BAD...

*YOU DON'T CONTROL
YOUR OWN CASELOAD...

ETHICS OPINION 86-04

THE UGLY...

DISBARRED FOR
"INEXPLICABLE INCOMPETENCE"
AND, WELL, YOU'LL SEE...



ER 1.2 SCOPE OF
REPRESENTATION

ER 1.2 SCOPE – REPRESENT.

- 1) _____
- 2) _____
- 3) _____
- 4) _____

Art. 2 § 2.1 – VBR

6) To confer with the prosecution ...
before trial or before any
disposition of the case...

ETHICS OPINION 01-13

THE UGLY...



MEANWHILE, OUT WEST...

ER 1.3 DILIGENCE

ER 1.3 DILIGENCE

1) _____

2) _____

THE GOOD...

RULE 8

THE BAD...



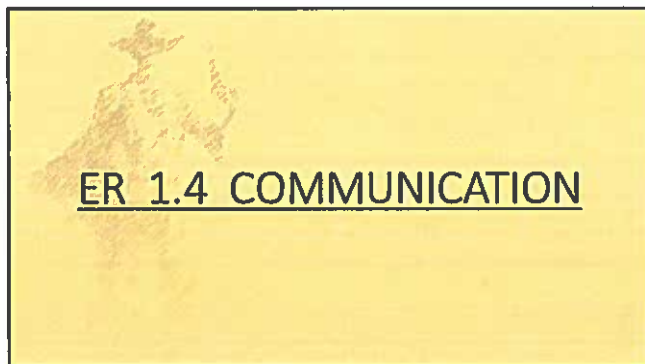
Art. 2 § 2.1 – VBR

10) To a speedy trial or disposition...

THE UGLY...







ER 1.4 COMMUNICATION

1) _____

2) _____

Art. 2 § 2.1 – VBR

3) To be present at and informed of all criminal proceedings...

THE UGLY...



ER 1.11(C) SPECIAL CONFLICTS OF INTERESTS

"[A] prosecutor's duty to avoid a conflict of interest is prime because his paramount duty is to the principle of fairness."

THE GOOD...

- 1) Romley v. Superior Court ("Flores")
- 2) Romley v. Superior Court ("Pearson")
- 3) Villalpando v. Reagan (Mesa CAO)

Romley v. Superior Court ("Flores")

Romley v. Superior Court ("Pearson")

Villalpando v. Reagan (Mesa CAO)

THE BAD...

State v. Martinez-Serna

THE UGLY...



MEANWHILE, OUT WEST...

**ER 3.1 MERITORIOUS
CLAIMS & CONTENTIONS****GOOD FAITH BASIS IN:**

1) _____

2) _____

THE GOOD...**REASONABLE LIKELIHOOD
OF _____.**

THE BAD...

In re Zawada

THE UGLY...



ER 3.2 EXPEDITING LITIGATION

ER 3.3 CANDOR → TRIBUNAL

THE UGLY...

IN RE HANSEN (a)(1)
&
IN RE PEASLEY (a)(3)

MEANWHILE, OUT WEST...

ER 3.4 FAIRNESS TO
OPPOSING PARTY & COUNSEL

DON'T...

- 1) _____
- 2) _____
- 3) _____
- 4) _____

PLEA AGREEMENTS & FAIRNESS

...offer an inducement to a witness...

STATE v. DUMAINE, 162 Ariz. 392 (Ariz. 1989)

THE COUNTY ATTORNEY MAY NOT REFUSE TO PLEA BARGAIN OUT OF ANIMUS TOWARD THE DEFENDANT'S ATTORNEY. HE MAY PLEA BARGAIN OR NOT, DEPENDING ON HOW HIS CASE FITS THE POLICIES AND STANDARDS OF HIS OFFICE. HE MUST HOWEVER, HAVE SOME VALID REASON...

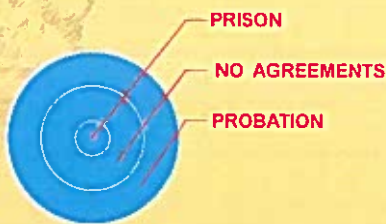
THE DEFENDANT RAISES A STRONG CLAIM THAT THE REFUSAL TO OFFER A PLEA BARGAIN WAS BASED ON ANIMUS TOWARDS THE DEFENDANT'S ATTORNEY AND THEREFORE DISCRIMINATORY AND THAT THE COUNTY ATTORNEY'S OFFICE LACKS POLICIES CONCERNING PLEA BARGAINS.

ABA STANDARD 3 – 2.5

EACH OFFICE SHOULD DEVELOP GENERAL POLICIES TO GUIDE THE EXERCISE OF PROSECUTORIAL DISCRETION...

THE OBJECTIVES OF THESE POLICIES SHOULD BE TO ACHIEVE A FAIR, EFFICIENT, AND EFFECTIVE ENFORCEMENT OF THE CRIMINAL LAW.

A GUIDE TO PLEA OFFERS



PLEA AGREEMENTS & FAIRNESS

- 1) BREACH OF PLEA AGREEMENT BY STATE IS NOT "HARMLESS ERROR"
- 2) HARSHER PLEA AFTER EXPIRATION OF THE FIRST IS NOT VINDICTIVE (PLEA DEADLINES)

MEANWHILE, OUT WEST...

ER 3.8 RULES FOR...

ER 3.8 "Golden Rule"

- 1) Prosecute only if supported by _____
- 2) Make reasonable efforts to assure accused has been advised of his right to _____
- 3) Make timely disclosure of _____ evid.
- 4) Don't subpoena a _____
- 5) Refrain from making extrajudicial _____
- 6) _____ new, credible, material evid. even after conviction
- 7) Set aside conviction if prosecutor knows Δ is _____

WHEN IN DOUBT, GET IT OUT...

ETHICS OPINION 94-07 – DISCLOSURE

- 1) WITNESS DIES – PLEA OUT
- 2) EVID. DESTROYED – PLEA OUT
- 3) EVID. CONSUMED – PLEA OUT



Napue, Giglio, Jencks & Brady — The Many Heads of the Hydra

Shawn C. Fuller
Chief Deputy County Attorney, Gila County Attorney's Office
Payson, Arizona

Napue – The First Head

Napue v. Illinois, 360 U.S. 264 (1959)

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness."

Id. at 269.

Napue – The First Head

- **Facts:**

- Napue was tried and convicted of the 1938 murder of a Chicago policeman.

- State's key witness at trial was a co-defendant, Hamer, serving 399 years for his participation.

- Post-conviction filing of prosecutor showed—contrary to trial testimony—that Hamer had been promised leniency for his testimony.

- **Issue on Appeal:**

- Did prosecutor's failure to correct false testimony violate Napue's due process rights?

Napue – The First Head

Cross Examination:

Q. Did anybody give you a reward or promise you a reward for testimony?

A. **There ain't nobody promised me anything.**

Redirect:

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. **You did not.**

• Trial Testimony of George Hamer

Napue – The First Head

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

• *Id.* at 270 (emphasis added and citation omitted).

ARIZONA'S "NAPUE"

Arizona v. Ferrari, 112 Ariz. 324 (Ariz. 1975)

"Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of showing prejudice to the defendant."

Giglio – The Second Head

"[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."

- Giglio, 405 U.S. at 156 (emphasis added).

Giglio – The Second Head

Facts:

- Giglio was tried and convicted of passing forged money orders and sentenced to five years in prison, largely based on the testimony of co-conspirator Taliento.
- Giglio was indicted by one AUSA, DiPaola, who promised Taliento immunity in exchange for his testimony. Giglio was then tried by a second AUSA, Golden, who was unaware of the agreement and did not disclose it.

Issue on Appeal:

- Did the prosecutor's failure to disclose the agreement violate Giglio's due process rights?

Giglio – The Second Head

Cross Examination:

Q: Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

A: **Nobody told me I wouldn't be prosecuted.**

Q: They told you you might not be prosecuted?

A: **I believe I still could be prosecuted.**

- Trial testimony of Robert Taliento

Giglio – The Second Head

Cross Examination:

Q: Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

A: Not at that particular time.

Q: To this date, have you been charged with any crime?

A: Not that I know of, unless they are still going to prosecute.

- Trial testimony of Robert Taliento

Giglio – The Second Head

"[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."

Giglio, 405 U.S. at 154 (emphasis added).

ARIZONA'S "GIGLIO"

Arizona v. Serna, 163 Ariz. 260 (Ariz. 1990)

"It is firmly established that the state cannot knowingly conceal any leniency agreement entered into with a material witness."

Id. at 264.

Jencks – The Third Head

Jencks v. United States, 353 U.S. 657 (1957)
The Jencks Act, 18 U.S.C. § 3500

"We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. . . . Justice requires no less."

- Jencks, *supra*, at 669.

Jencks – The Third Head

- Facts:
 - Jencks was tried and convicted of falsely swearing that he was not a communist.
 - At trial the prosecution relied on the testimony of two informants, both of whom testified that they had made regular oral and written reports to the FBI agents who supervised them.
 - Following their testimony, Jencks moved the Court to require these reports be produced. The Court denied the motion.
- Issue on Appeal:
 - Was the non-production of these reports in error?

Jencks – The Third Head

The Jencks Act, 18 U.S.C.A. § 3500

"After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

-Id.

RULE 15

Arizona v. Gulbrandson, 184 Ariz. 46 (Ariz. 1995)

"Defendant has a due process right to timely disclosure of _____ evidence."

-Id. at 63 (emphasis added).

Brady – The Immortal Head

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

-Id. at 87 (emphasis added).

Brady – The Immortal Head

- Facts:

- Brady and a co-defendant, Boblit, were separately tried and convicted of a 1958 murder committed in the course of a bank robbery. Both were sentenced to death.

- The prosecution disclosed four signed confessions of Boblit implicating Brady as the person who actually murdered the victim, *but did not disclose a fifth unsigned confession indicating Boblit had done the deed.*

- Issue on Appeal:

- Did prosecutor's failure to disclose the unsigned confession violate Brady's due process rights?

Brady – The Immortal Head

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

-Id. at 87 (emphasis added).

"Brady" Requirements Generally

Due Process Requires that:

- 1) The Govt. has _____ to disclose material evidence favorable to the Defendant in its possession;
- 2) Evidence affecting _____ of a Govt. witness is "material"; and
- 3) Failure to disclose is in error regardless of _____ of the prosecutor.

RULE 15.1(b)(8)

Arizona v. Jessen, 130 Ariz. 1 (Ariz. 1981)

"The disclosure required of the State under Rule 15.1, Arizona Rules of Criminal Procedure, is broader than the requirements of Brady. There may be violations of Rule 15.1, although arguably harmless, where there is no Brady violation."

-Id.

RULE 15.1(b)(8)

Arizona v. Jessen, 130 Ariz. 1 (Ariz. 1981)

"The disclosure required of the State under Rule 15.1, Arizona Rules of Criminal Procedure, is broader than the requirements of Brady. There may be violations of Rule 15.1, although arguably harmless, where there is no Brady violation."

Id.

U.S. v. THEODORE F. STEVENS**U.S. v. THEODORE F. STEVENS**

**"SLOPPY & LAZY" HAS
CONSEQUENCES...**

MEANWHILE, OUT WEST...

ER 3.8 & 3.6 TRIAL PUBLICITY

THE GOOD...

STATE v. AGNEW

COX v. COLLINS

THE BAD...

BUCKLEY v. FITZSIMMONS

STATE v. SUP. COURT (FORD)

THE UGLY...



ER 3.10 EXCULPATORY INFO
POST – CONVICTION

PROSECUTORIAL IMMUNITY
(DON'T GET YOURS REVOKED)

THE GOOD...

WE ARE GENERALLY IMMUNE
FROM CIVIL LIABILITIES FOR
ACTIONS TAKEN IN OUR
OFFICIAL CAPACITIES...

IMMUNITY

QUALIFIED ABSOLUTE

THE BAD...

PROSECUTORIAL IMMUNITY
DOESN'T PROTECT US FROM
THE UNEMPLOYMENT LINE...



THE UGLY...



GETTING SUED HAPPENS...



THE REALLY UGLY...